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UNITED STATES DISTRICT COURT  
 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

EPIC GAMES, INC.,

Plaintiff, Counter-  
 defendant

v.

APPLE INC.,

Defendant,  
 Counterclaimant.

Case No. 4:20-cv-05640-YGR-TSH

**DECLARATION OF RACHEL S. BRASS IN  
 SUPPORT OF DEFENDANT APPLE INC.'S  
 ADMINISTRATIVE MOTION TO  
 PARTIALLY SEAL EXPERT WRITTEN  
 DIRECT TESTIMONY**

Pursuant to Civil Local Rule 79-5, I hereby declare as follows:

1. I am an attorney licensed to practice in the State of California, and a member of the Bar of this Court. I am a partner at the law firm Gibson, Dunn & Crutcher LLP, counsel of record for Defendant Apple Inc. (“Apple”) in this case. I am familiar with Apple’s treatment of highly proprietary and confidential information, based on my personal experience representing Apple.<sup>1</sup> I have personal knowledge of the facts stated below and, if called as a witness, I could and would testify competently thereto. I submit this declaration in support of Apple’s Administrative Motion to Partially Seal Expert Written Direct Testimony.

2. When a party seeks to seal records for use at trial, there is a “strong presumption in favor of access” that can be overcome only by “compelling reasons.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quotation marks omitted). The party seeking to seal the document or proceedings must “articulate compelling reasons supported by specific factual findings that outweigh the general history of access and the public policies favoring disclosure.” *Id.* at 1178–79 (alteration, citation, and quotation marks omitted). “In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or release trade secrets.” *Id.* at 1179 (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)).

3. Apple operates in an intensely competitive marketplace. It occupies a unique position as a leader with respect to a number of highly dynamic technologies. Apple has serious and legitimate concerns that competitors will be quick to pounce on any release of Apple’s highly sensitive, proprietary information in order to gain competitive advantage. As such, Apple takes extensive measures to protect the confidentiality of its proprietary information.

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<sup>1</sup> Courts in this District routinely grant motions to seal on the basis of declarations of counsel submitted pursuant to Local Rule 79-5. *See, e.g., In Re Qualcomm Litig.*, No. 17-00108, Dkt. 398-1 (S.D. Cal. Mar. 3, 2018); *Avago Techs. U.S. Inc., et al. v. Iptronics Inc., et al.*, No. 10-02863-EJD, Dkt. 544 (N.D. Cal. Apr. 3, 2015); *Cisco Sys., Inc., et al. v. Opentv Inc., et al.*, No. 13-00282-EJD, Dkt. 76 (N.D. Cal. Oct. 8, 2018). I am personally familiar with Apple’s safeguarding of proprietary information, but if the Court deems this declaration insufficient, Apple respectfully requests that it be permitted to file a further declaration supporting filing under seal.

4. The Court has “broad latitude” “to prevent disclosure of materials for many types of information, including, *but not limited to*, trade secrets or other confidential research, development, or commercial information.” *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1211 (9th Cir. 2002) (emphasis in original).

5. The Court has expressed a desire for these proceedings to be public. To that end, Apple has carefully reviewed its expert written directs and now proposes only those redactions that are essential.

6. Specifically, Apple seeks only to seal information about non-public financial information. The public disclosure of such information would cause Apple economic harm and put it at competitive disadvantage. *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097 (9th Cir. 2016), *cert. denied sub nom. FCA U.S. LLC v. Ctr. for Auto Safety*, 137 S. Ct. 38 (2016) (finding there was a compelling reason for sealing when records contain business information that could be used to harm a litigant’s competitive standing). It would give Apple’s competition confidential information about Apple’s business model and strategy. *Apple Inc. v. Samsung Electronics Co., Ltd.*, 727 F.3d 1214, 1228 (Fed. Cir. 2013) (concluding the district court abused its discretion in denying a motion to seal about “profit, cost, and margin data”).

7. The information Apple seeks to protect is foundational to its business, and Apple has exerted great effort and undertaken substantial expense to protect such information. Apple has narrowly tailored its sealing request so as to maximize the public’s access to court proceedings without jeopardizing Apple’s business interests.

8. Specifically, Apple seeks to seal certain financial and business information about the App Store, such as information about internal Apple calculations of the App Store’s market share, as well as about the total revenue generated by the App Store. *See* Written Direct Testimony of Lorin M. Hitt, Ph.D (“Hitt Direct”) ¶ 117, Figure 27; Written Direct Testimony of Richard Schmalensee, Ph.D (“Schmalensee Direct”) ¶ 170. It also seeks to seal information revealing what portion of that revenue is generated by particular apps or categories of apps. *See* Hitt Direct ¶ 117, Figure 22. Disclosure of this information about the inner workings of the App Store would give Apple’s competitors an unfair insight into Apple’s business model and strategy, putting Apple at a competitive disadvantage. It would

1 also undermine Apple's business relationship with its developer partners who trust that Apple will keep  
2 their private financial information confidential. Likewise, Apple seeks to seal information about a  
3 2018 industry survey that it commissioned to evaluate the behavior of gamers on the App Store and  
4 other platforms. *See* Hitt Direct ¶ 61. Releasing this information to the public would provide  
5 competitors with unfair visibility into Apple's process for making financial decisions or other business  
6 decisions.

7 9. Based on similar concerns regarding the creation of an unfair field of competition, Apple  
8 seeks to shield from public disclosure an estimate made by Epic's expert Dr. Evans of how much Apple  
9 could have allegedly increased the App Store's profits by raising prices. *See* Schmalensee Direct ¶ 95.  
10 Dr. Evans's calculation is based on nonpublic App Store transaction data. Disclosure of his purported  
11 estimate could allow savvy readers to reverse-engineer information that Apple works hard to keep  
12 confidential, such as the number of iOS users who spend on IAP. Competitors who learn of this  
13 information would gain a competitive advantage over Apple. Dr. Evans's estimate also relies on survey  
14 data that may be unreliable. Thus, disclosure of his estimate presents a risk of disrupting the orderly  
15 release of audited Apple financial statements and injecting needless volatility into Apple's stock price,  
16 and in turn, market indices, including the S&P 500.

17 10. Finally, Apple also seeks to seal information about how many iOS devices were sold  
18 from 2009 to 2019. *See* Hitt Direct ¶ 187, Figure 47. Apple does not provide—and is not required to  
19 provide, under the applicable statutes and regulations—this information to the public. Disclosure of  
20 this information would cause Apple economic harm and allow Apple's competitors to gain knowledge  
21 of Apple's internal business operations that they would not have been able to access in the ordinary  
22 course of business.

23 11. I have met and conferred in good faith with counsel for Epic, including by telephone, in  
24 an effort to narrow the documents and testimony that the parties propose to maintain under seal. This  
25 process has resulted in narrowing the amount of designated confidential material and consequently  
26 reduced the need for provisional sealing (pursuant to Local Rule 79-5(e)) of material designated by the  
27 other party as confidential. The redacted versions of the written direct testimony of Apple's experts  
28 reflect the results of that negotiation.

12. Below is a chart detailing the specific items of Apple's that are sealable for the reasons explained herein, highlighted in yellow in the attached unredacted versions.

Document or Portion of Document Sought to be Sealed	Reason for Redaction
Hitt ¶ 61	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Hitt ¶ 117	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Hitt ¶ 187	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Hitt Figure 22	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Hitt Figure 27	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Hitt Figure 47	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Schmalensee ¶ 95	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.
Schmalensee ¶ 170	Contains non-public financial information that, if disclosed, would put Apple at a competitive disadvantage.

13. Pursuant to Local Rule 79-5(e), below is a list reflecting the information designated by other parties as confidential, on which Apple takes no position, highlighted in blue in the attached unredacted version:

Document or Portion of Document Sought to be Sealed	Reason for Redaction
Hitt ¶ 28	Epic or Third Party Designation
Hitt ¶ 29	Epic or Third Party Designation
Hitt Figure 2	Epic or Third Party Designation

1	Hitt ¶ 33	Epic or Third Party Designation
2	Hitt Figure 4	Epic or Third Party Designation
3	Hitt Figure 5	Epic or Third Party Designation
4	Hitt ¶ 102	Epic or Third Party Designation
5	Hitt Figure 22	Epic or Third Party Designation
6	Hitt Figure 23	Epic or Third Party Designation
7	Hitt ¶ 103	Epic or Third Party Designation
8	Hitt Figure 24	Epic or Third Party Designation
9	Hitt ¶ 104	Epic or Third Party Designation
10	Hitt Figure 25	Epic or Third Party Designation
11	Hitt ¶ 105	Epic or Third Party Designation
12	Hitt ¶ 112	Epic or Third Party Designation
13	Hitt Figure 28	Epic or Third Party Designation
14	Hitt ¶ 114	Epic or Third Party Designation
15	Hitt ¶ 115	Epic or Third Party Designation
16	Hitt ¶ 147	Epic or Third Party Designation
17	Hitt ¶ 147	Epic or Third Party Designation
18	Hitt ¶ 163	Epic or Third Party Designation
19	Hitt ¶ 164	Epic or Third Party Designation
20	Hitt Figure 37	Epic or Third Party Designation
21	Hitt ¶ 184	Epic or Third Party Designation
22	Hitt Figure 46	Epic or Third Party Designation
23	Hitt ¶ 209	Epic or Third Party Designation
24	Hitt ¶ 210	Epic or Third Party Designation
25	Hitt ¶ 211	Epic or Third Party Designation
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Hitt ¶ 213	Epic or Third Party Designation
Hitt ¶ 255	Epic or Third Party Designation
Hitt ¶ 256	Epic or Third Party Designation
Hitt ¶ 260	Epic or Third Party Designation
Lafontaine ¶ 38	Epic or Third Party Designation
Lafontaine ¶ 40	Epic or Third Party Designation
Lafontaine ¶ 100	Epic or Third Party Designation
Rubin ¶ 57	Epic or Third Party Designation
Rubin ¶ 129	Epic or Third Party Designation

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this Declaration was executed on April 27, 2021 at San Francisco, California.

/s/ Rachel S. Brass

Rachel S. Brass